

SERVED: February 25, 2000

NTSB Order No. EA-4825

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of February, 2000

JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15827
v.)	
)	
TOMMY HUE NIX,)	
)	
Respondent.)	
)	

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge William A. Pope rendered in this emergency revocation proceeding on February 3, 2000, at the conclusion of an evidentiary hearing.¹ By that decision, the law judge affirmed, in substantial part, the Administrator's allegations that respondent had provided numerous passenger

¹An excerpt from the hearing transcript containing the initial decision is attached.

flights for compensation or hire without possessing appropriate operating authority. The law judge concluded, however, that a 120-day suspension of respondent's commercial pilot certificate, not revocation, was the appropriate sanction.² For the reasons discussed below, the respondent's appeal will be denied.

The December 15, 1999 Emergency Order of Revocation alleged, among other things, the following facts and circumstances concerning the respondent:

1. At all times material herein, you were, and are now, the holder of Commercial Pilot Certificate No. 416688449.
2. At all times material herein, you were, and are now, the owner and operator of Nix Flying Service located in Belmont, Mississippi.
3. At all times material herein, you exercised operational control of Nix Flying Service.
4. At all times material herein, Nix Flying Service did not have an air carrier certificate issued under Part 119 of the Federal Aviation Regulations ("FAR") or an air carrier certificate issued under Part 135 of the FARs.
5. From January 01, 1999 until September 22, 1999, Nix Flying Service, under your operational control, arranged to provide air transportation services for personnel of Belmont Homes, Inc. ("Belmont") on 48 separate trips. (See exhibit attached at tab A for a description of each trip)
6. Furthermore, you acted as pilot-in-command ("PIC") on many of the trips.
7. Specifically, between January and October 1999, you were contacted by Belmont employees and asked to provide an aircraft and pilot(s) to fly Belmont personnel to various locations.
8. On each of the 48 trips referred to above, Nix Flying Service, under your operational control, provided an

²The Administrator filed a notice of appeal from the law judge's decision, but she did not file a brief to perfect the appeal. Her appeal will therefore be dismissed.

aircraft and pilot(s) for Belmont personnel.

9. Nix Flying Service conducted each flight for compensation or hire.

10. On at least one trip for Belmont, Nix Flying Service used Terry Nix as PIC.

11. Under your operational control, Terry Nix flew Belmont personnel as the PIC on a revenue generating flight.

12. At the time of the flight described immediately above, Terry Nix did not hold a commercial pilot rating, instead he only held a private pilot certificate.

13. None of the pilots provided by Nix Flying Service to fly Belmont personnel, including you and Terry Nix, were qualified to operate as a PIC on a passenger carrying, revenue generating flight under Part 135 of the FARs.

The law judge concluded that the evidence was sufficient to support findings that respondent had, as charged, performed direct air carrier services without requisite authority from the Administrator, in violation of FAR section 119.5(g), that he had done so without compliance with the testing, competency, or proficiency requirements set forth in 135.293(a) and (b), 135.299(a), and that his provision of unauthorized air transportation services justified the residual charge of reckless or careless operation under section 91.13(a). However, the law judge was not persuaded by the evidence either that the respondent had advertised the unauthorized service or that Terry Nix had flown any Belmont personnel for respondent during the period covered by the complaint (i.e., between January and October, 1999). He therefore dismissed the charges related to those alleged regulatory violations (sections 119.5(k) and

135.243(b)(1)).³

On appeal respondent, by counsel, maintains that the law judge should not have found that he exercised operational control over the flights referenced in the complaint because Belmont had executed leases that transferred such control to it.⁴ Although we believe the law judge correctly determined that the respondent, notwithstanding any language in the documents Belmont signed concerning the aircraft that were used, exercised operational control within the meaning of Part 135, we are not convinced that any valid lease agreements applied to these flights. Before discussing our reasons for that view, a brief review of the operative facts, thoroughly recounted in the initial decision, would be helpful.

Respondent, who is both an airman and a mechanic with an inspection authorization, is the sole proprietor of Nix Flying Service, an entity that provides flight training, aircraft rentals, and aircraft maintenance. Nix Flying Service, immediately prior to this action, apparently had only two other employees, respondent's son, Terry, a pilot, and his wife, Merline, who performed various administrative and other chores around their office at the Belmont, MS airport. Merline Nix is also the sole proprietor and only employee of Aircraft Leasing,

³Section 135.243(b)(1) forbids a Part 135 certificate holder from using as a pilot-in-command anyone who does not hold at least a commercial pilot certificate.

⁴The Administrator has filed a reply brief opposing the appeal.

an entity she formed to generate income from aircraft rentals. Aircraft Leasing and Nix Flying Service share, among other things, the same small office space and phone number, and Aircraft Leasing's four or five aircraft are kept in Nix Flying Service hangars and are maintained by Nix Flying Service.⁵

Respondent had been flying Belmont Homes personnel from time to time to various points on company business for several years before his wife started Aircraft Leasing and acquired some aircraft. At some point the president of Belmont was asked to sign what purport to be lease agreements with Aircraft Leasing for the aircraft that they had been or would be using for their sporadic needs. Nix Flying Service continued to maintain and house the aircraft covered by the leases. As before, whenever Belmont personnel needed air transport, a call would be placed to respondent at the phone number Aircraft Leasing and Nix Flying Service shared and respondent, on learning the details of the requested travel, either directly or from messages relayed by his wife, would make all the necessary arrangements for the trip and either pilot the flight himself or have a pilot he employed fly it. As the law judge put it (I.D. at 582), in language echoing our decision in Administrator v. Golden Eagle Aviation, Inc., 1 NTSB 1028, 1031 (1971):

The respondent exercised complete control over all aviation phases and requirements of these operations which required any aviation expertise, leaving to Belmont Homes

⁵The record contains no documentation concerning these arrangements or compensation for services Nix Flying Service provides for Aircraft Leasing.

only those decisions normally left to a customer such as who was to be transported, to and from which points, and at what times.

Respondent in his brief makes no attempt to refute the law judge's assessment that Belmont, notwithstanding any lease agreements it may have signed, did not understand that it had any responsibility under FAR Part 91 for the operation of the flights it asked respondent to perform, nor intended to assume any such obligations, but was simply interested in obtaining a plane and pilot to meet its business travel needs. In these circumstances, as the law judge recognized, it makes no difference that the leases purported to shift operational control to Belmont by specifying that Belmont would provide its own pilot and accept legal responsibility for the flights.⁶ There is no doubting here that the signing of the leases, for reasons which are not fully explained in this record, did not change the character of the longstanding arrangement between respondent and Belmont, whereby a call to respondent generated a pilot and an aircraft for Belmont's use. Nothing in respondent's brief warrants a departure from our precedent that the provision of both plane and crew from a single source generally is deemed to be conclusive proof of carriage for compensation or hire. See Administrator v. Poirier, 5 NTSB 1928, 1930 (1987), citing Golden Eagle.

⁶We observed in Administrator v. Davis, NTSB Order No. EA-4255 (1994) at p. 5, n.5, that "even a written lease agreement which explicitly purports to fix operational control with the lessee of an aircraft may not be dispositive on the issue of operational control."

In addition to the foregoing, we do not believe that the "lease agreements" relied on by respondent could be deemed valid, even if Aircraft Leasing and Nix Flying Service maintained an arm's length relationship, which, it is plain, they do not. In the first place, they are not signed by Aircraft Leasing. Thus, for example, if Belmont sought to use one of the aircraft with a pilot other than respondent, Aircraft Leasing would not be bound to honor such a request. Moreover, the lease agreements contain no reciprocal promises: Aircraft Leasing made no representations concerning the availability of its aircraft for Belmont's use, and Belmont made no commitments concerning minimum or maximum use of any of the aircraft during the one year term of the agreements. At most, the leases could be viewed as offers to rent specified aircraft for a particular hourly rate that could be changed on 30 days' notice. The absence of any clear or mutual benefit to the parties from the existence of these documents lends support for the belief that they were intended simply to create the appearance that separate arrangements for pilot and plane were in effect for flights that were handled no differently from those made before the leases were drafted.

Because the respondent chose not to testify in his own defense, there is no sound basis for reaching any conclusions concerning his intent with respect to the violations the law judge upheld. At the same time, the 120-day suspension imposed by the law judge is not outside the range of sanction for the high number of violations committed in connection with the 48

Belmont flights, and it does not seem excessive to us in the circumstances of this case.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied;
2. The emergency order of revocation, as modified by the law judge, and the initial decision are affirmed.

HALL, Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.